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CURRENT TOPICS.

In *Re State Insurance Co.*, determined in the United States District Court in this city this week, it appeared that the vice-president of the bankrupt corporation had bought up claims against it at a discount and reduced them to judgment. He now asked to prove for the full amount of the judgment. It was held by Treat, J., that this could not be allowed. "A person occupying the relation of trustee will not be allowed to speculate out of the subject-matter of his trust." He was allowed to prove for the amount of money actually expended, with interest.

In *Hannibal & St. Joseph R. R. v. Husen*, the Supreme Court of the United States, during the present term, declared the Missouri statute known as the Texas cattle law to be unconstitutional, reversing the decision of the state supreme court. The statute in question prohibited the driving or bringing into the state of any Texas, Mexican or Indian cattle between the first days of March and November in each year. The grounds upon which the opinion of the court rests, are, that such a statute is not a legitimate exercise of the police powers of a state; that the latter can not be exercised over a subject such as inter-state transportation of subjects of commerce, confided exclusively to Congress by the Federal Constitution; that while a state may enact sanitary laws, while, for the purpose of self-protection, it may establish quarantine and reasonable inspection regulations, while it may prevent persons and animals suffering under contagious or infectious diseases from entering the state, it can not interfere with transportation into or through its borders, beyond what is absolutely necessary for its self-protection; that neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred by the Constitution upon Congress. We are in receipt of some communications upon this decision, which we will endeavor to publish at an early date.

On the 1st inst. Mr. Justice Bradley of the Supreme Court of the United States in *Re Wells, et al.*, 17 Alb. L. J., 111, delivered a lengthy opinion on the question of the right to remove causes to the federal courts under the civil rights law. The petitioners, the members of the Louisiana Returning Board, who were under indictment in the state courts for acts done in their official capacities, applied to the Circuit Justice for a *certiorari* to transfer the proceedings to the Federal Courts under § 641 of the Revised Statutes. A statute of Louisiana, of March 13, 1877, prescribing the mode of selecting and drawing jurors, provides for the appointment, by the judges of the principal courts in New Orleans, of the commissioners, whose duty it is made to select impartially, from the citizens of the parish qualified to vote, the names of not less than one thousand good and competent men to serve on juries. These names are placed in a box, and from them is to be drawn the general panel for each term. The petitioners charged that the statute was intended to operate in favor of white and against colored citizens; that the machinery of the law was being manipulated by the state officers for the purpose of depriving them (two of the petioners being colored men) of a fair and impartial trial, etc. The learned judge held that the jury law was not in conflict with the Federal Constitution, and that the fact that its provisions might be taken advantage of so as to procure a jury prejudiced against the petitioners, did not furnish a ground for the removal of a criminal proceeding to the federal court, under § 641 of the Revised Statutes. "The fourteenth amendment, which guarantees the equal benefit of the laws," said the learned judge, "only prohibits state legislation violative of said right. It is not directed against individual infringements thereof. The Civil Rights bill of 1866 was broader in its scope, undertaking to vindicate those rights against individual aggression, but still only when committed under color of some law, statute, ordinance, regulation or custom. And when that provision in this law, which is transferred to § 641 of the Revised Statutes, gave the right to remove to the United States courts a cause commenced in a state court against a person who is denied and can not enforce any of the rights secured by the act, it has reference to a denial of those rights or

impediments to their enforcement arising from some state law, statute, regulation or custom. It is only when some such hostile state legislation can be shown to exist, interfering with the party's right of defense, that he can have his cause removed to the federal courts." Though refusing the writ, Mr. Justice Bradley suggested that, after final judgment in the state court, the petitioners should carry the case to the Supreme Court of the United States.

A very novel action—a suit by a life insurance company against a person who had wilfully caused the death of one whose life it had insured, was disposed of during the present term of the Supreme Court of the United States in *Mobile Life Ins. Co. v. Brame*, the court holding that no cause of action arose, even though the company had, in consequence of the death of the insured at the hands of the defendant, been forced to pay the loss. The court first consider the case as affected by the rule of the common law, that no civil action lies for an injury which results in death, and state that "it is impossible to speak of it as a proposition open to question," citing Baker v. Bolton, 1 Camp. 493; Conn. Ins. Co. v. N. Y. & N. H., 25 Conn. 265; Kramer v. Market, 25 Cal. 235; Indianapolis v. Kealy, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Shields v. Young, 15 Ga. 349; Peoria v. Frost, 37 Ill. 333; Hubgn v. N. O. & C. R. R. R., 6 La. Ann. 496; Herman v. Carrolton R. R. Co., 11 La. Ann. 21; and say: "The only cases that tend to the contrary of this rule, so far as we know, are those of Cross v. Guthery, 2 Root, 90, of Plummer v. Webb. Weare, 75, and of Ford v. Monroe, 20 Hurd, 210. These cases are considered by the New York Court of Appeals in the case of Green v. The Hudson R. R. Co., 2 Keyes, 300, and compared with the many cases to the contrary, and are held not to diminish the force of the rule as above stated. * * * By the common law, actions for injuries to the person abate by death, and can not be revived or maintained by the executor or by the heir. By the act of Parliament of August 21, 1846 (9 and 10 Victoria), an action in certain cases is given to the representatives of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our states. * * * The case of a creditor, much less a remote claimant like the plaintiff, is not within the statute."

Cf. 2 R.S. (1776) 309

In regard to the remoteness of the injury, the court say: "The relation between the insurance company and McLemore, the deceased, was created by contract between them. But Brame was no party to a contract. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing. In Rockingham Ins. Co. v. Mosher, 39 Me. 253, where an insurance company brought suit against one who had wilfully fired a store upon which it had a policy of insurance, which it was thereby compelled to pay, it was held that the loss was remote and indirect, and that the action could not be sustained. In Ashley v. Dixon, 48 N. Y. 430, it was held that if A is under a contract to convey his land to B, and C persuades him not to do so, no action lies by B against C. So a witness is not liable for evidence given by him in a suit, although false, by which another is injured. Grove v. Brandenburg, 7 Blackf. 234; Dunlap v. Gledden, 31 Me. 435. And in Anthony v. Slaid, 11 Metc. 290, a contractor for the support of town paupers had been subjected to extra expense in consequence of personal injury inflicted upon one of the paupers, and brought the action against the assailant to recover for such expenditure. The court held the damage to be remote and indirect, and not sustained by means of any natural or legal relation between the plaintiff and the party injured, but simply by means of a special contract between the plaintiff and the town. Some authorities of text-writers are referred to as holding a different view, but we are not cited to any case in this country or Great Britain where a different doctrine has been held." The case which most nearly resembles the present is, we believe, that of Connecticut Mutual Life Ins. Co. v. N. Y. & N. H. R. R. 25 Conn. 265. This differs from the case at bar only in this, that the death was caused by the negligence of the defendant. The court held that the company could not recover.

FOREIGN RECEIVERS.

The question of the powers of receivers, appointed in one state, to institute proceedings in the courts of another state, is becoming, in this day of insolvent corporations, one of great importance; and, as the views of the profession are very diverse, it may not be uninteresting to briefly review some of the authorities.

We find the views of a learned writer, in opposition to such a power, laid down in unequivocal terms in High on Receivers, p. 156, § 239, to the effect that receivers have no extra-territorial power of action, and can perform no act in their official capacity outside of the jurisdiction of the court which appoints them, citing in support of his views Booth v. Clark, 17 How. (U. S.) 322; Farmers, etc., Bank v. Needles, 52 Mo. 17; Warren v. Union Nat. Bk., 7 Phila. 156; Hope Mutual Ins. Co. v. Taylor, 2 Robt. 278. Bearing in mind that "the positive authority of a decision is co-extensive only with the facts on which it is made," let us look at the facts of the leading case relied upon by this author, and consider whether they justify his reasoning.

While the suit was nominally between Booth (a receiver appointed under a creditor's bill by the chancellor of the first circuit in the state of New York) and Clark (the original defendant in the proceeding in which such receiver was appointed), in the Circuit Court of the United States for the District of Columbia, yet the answer of Clark discloses that he was adjudged a bankrupt while a resident of New Hampshire, and subsequently to the appointment of the receiver; that all his property, including a claim of said Clark against the government of Union County, adjudged to said Clark by the United States commissioners, and the subject of controversy herein, became vested in such assignee. As the court say, on p. 329, *et seq.*: "This suit, then, is substantially between Hackett, as the assignee of Clark, in bankruptcy, and Booth, the receiver under the creditor's bill, that it may be determined by this court which has the official right to the Mexican fund." The court further say, p. 320: "The leading point in the case is the effect of the proceedings under the last—the creditors' proceedings in New York—to give a right to the receiver, *in virtue of a lien which he claims upon the property of the debtor*, to sue for and recover any part of it, legal or equitable, without the jurisdiction of the state of New York."

While the court find it convenient to lay down the broad doctrine as stated by Mr. High, yet, when we apply that doctrine to the *facts* of the case, we see that it does not go to the length supposed. The court, in fact, decide that the receiver appointed in the state of New York has no *lien* upon the property of the debtor found in the District of Columbia, which he can enforce in the courts of that district to the *exclusion* of all other creditors of that debtor. This is all; the rest of the opinion, as to the general power of a receiver to sue in a foreign jurisdiction is *obiter dictum*, and wholly unnecessary to sustain the decree below, refusing to recognize or enforce a *lien*.

Now this position is entirely different from that of a receiver going into a foreign jurisdiction and seeking to collect the assets of the person or corporation whose successor he is, where there are no conflicting claims of creditors, foreign or domestic, and whose right so to do is denied by many of our courts.

The other cases cited by the author referred to, while they go to the length claimed by him, rest for their authority upon this case of Booth v. Clark, and are, with one exception, the decisions of inferior courts. In Farmers Bank v. Needles, *supra*, the Supreme Court of Missouri seem as unwilling to recognize what we consider a well established principle of comity, as they have ever been to give their consent to the thorough and complete amalgamation of legal and equitable actions in the "civil action" of their code.

Opposed to this class of cases we find a list of authorities recognizing, upon well-considered principles, this exercise of comity for which we are contending. In a line of decisions, commencing with Holmes v. Remsen, 20 Johns Rep. 229, it has been uniformly held in the state of New York, that, by virtue of this comity, the assignees of a foreign bankrupt were entitled to sue for and recover the debts due the bankrupt within that state, except where the claim of the assignees came in conflict with creditors in that state, claiming under attachment or other liens (see Hoyt v. Thompson, 5 N. Y. 320, 340,) and Abraham v. Plestoes, 3 Wend 538,

can not be said to throw any doubt upon this question.

Nor can it be claimed that foreign assignees in bankruptcy have any greater rights of official action when going into another jurisdiction, than receivers appointed by a court or under a statutory proceeding. As is said by Allen, J., in Willetts v. Waite, 25 N. Y. 577 (584), the title of such assignee is acquired by a conveyance wholly *in invitum*, and by operation of law, and such law is entirely inoperative outside of the limits of the power creating it, except as a *quasi* effect is given it as a matter of comity, and, when the rights of creditors or *bona fide* purchasers or the interests of the state do not interfere, by allowing the foreign transferee to recover it in the courts of the state where the property is found. Story Confl. Laws, 413. The same judge continues: "This has come to be the well-established rule of this state, the United States, and most of the states of the Union, and is no longer an open question."

This right of a foreign assignee in bankruptcy, founded solely "upon principles of comity and inter-state and inter-national courtesy," has been recognized in a receiver appointed under statutory proceedings in one state and suing in the courts of another, in Hoyt v. Thompson, *supra*, Willetts v. Waite, *supra*, and Runk v. St. John, 29 Barb. 285. It is admitted by the Supreme Court of Michigan, in Graydon v. Church, 7 Mich. 36, and, as we are informed, has been acknowledged by Justice Miller of the U. S. Supreme Court on circuit in the district of Iowa.

With this weight of authority and reason, opposed to the Supreme Court of Missouri, and the two inferior courts referred to above, the text-book statement of the law needs some modification, and courts should no longer shut their eyes to this and kindred principles so essential to a complete and harmonious union of our states.

G. F. H.

THE British Government has issued a Parliamentary document containing the reports made by the British counsuls on the industrial conflicts in the United States in July, 1877. It is a pamphlet of 58 pages, and contains a most voluminous account of the riots, the causes thereof, the official proclamations, messages and orders, details of the railroads affected, extracts from American newspapers, a complete account of the Brotherhood of Engineers, etc.

NATIONAL BANKS—RIGHTS AND LIABILITIES OF SHAREHOLDERS.

JOHNSON, RECEIVER, v. LAFLIN *ET AL.*

United States Circuit Court, Eastern District of Missouri, February, 1878.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. NATIONAL BANKS—RIGHT OF SHAREHOLDER TO TRANSFER STOCK.—Under the national banking act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferrers liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders.

2. WHERE SUCH A SALE OF SHARES is made, and the transfer entered on the books of the bank, the transferrer ceases to be a shareholder, and is freed from liability in respect of such shares.

3. NATIONAL BANKING ACT, SECTION 5139, CONSTRUED.—The provision of the national banking act, (Rev. Stats., sec. 5139), that shares shall be "transferable on the books of the association," construed; and held not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal.

4. SELLER AND PURCHASER—ELEMENTS OF A COMPLETED TRANSFER.—As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares duly assigned with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient groundfor refusing to register the transfer.

5. CASE IN JUDGMENT—CERTIFICATES—TRANSFER.—The defendant, Laflin, owning full-paid shares of stock in a national bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market; the broker, without Laflin's direction or knowledge at the time, sold the same at the market value to Britton, individually, and received in payment his individual check on the bank for the purchase-price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon indorsed, authorizing the transfer of the shares on the books of the bank; subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laflin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stock account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent; but this fact was not known by Laflin or the broker. *Held:* That, although the bank or its officers for it were prohibited from purchasing its own shares, (Rev. Stats., sec. 5201), yet that Laflin, having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment for the shares.

The plaintiff is the Receiver of the National Bank of the State of Missouri, appointed June 23d,

1877, by the Comptroller of the Currency. That bank suspended payment and closed its doors, June 20th, 1877.

The defendant, Laflin, had for some years prior to May 16th, 1877 been the owner of 85 shares of full paid stock in that bank, but was not a director. The defendant, Britton, was the president of the bank.

On the 10th day of May, 1877, Mr. Burr, the president of another bank, in which Laflin was a director, wrote a letter to a correspondent who was the owner of stock in the National Bank of the State of Missouri, stating (without giving the grounds of his advice), "you had better sell your stock in that bank because you can buy it back again at a profit if you wish to do so." Mr. Burr casually showed Laflin this letter and said "go and do likewise." An election was to be held for directors on the 29th day of May, 1877, which it was supposed would give the stock a greater value in the market before the election than it would have after that event.

Acting upon this general advice of Mr. Burr, and without personal knowledge of the actual financial condition of the bank, Laflin, on the 16th day of May, 1877, authorized one Keleher, a broker, to sell in the market his 85 shares of stock. Keleher sold the same at private sale for $5037.50 to James H. Britton, who then was, and for some years had been, the president of the bank. Mr. Britton gave Keleher to understand that he was buying either for himself or a party whose name he did not disclose. Britton paid Keleher the $5037.50 by his individual check on the bank of which he was president, and Keleher thereupon delivered Britton the certificates for the 85 shares of stock, assigned in blank together with a blank power of attorney indorsed thereon, signed by Laflin, authorizing the transfer of the stock on the books of the bank. The stock certificates contained this provision: "Transferable only on the books of said bank in person, or by attorney on the return of this certificate, and in conformity with the provisions of the laws of congress and the by-laws which may be in force at the time of such transfer."

There were no by-laws on the subject of the transfer of stock. Keleher immediately presented Britton's check at the counter of the bank and received thereon the $5,037.50, and deposited the amount in his own name with his own bankers, the Messrs. Bartholow, Lewis & Co., upon whom he gave Laflin his own check for $4,995—being the proceeds of the sale to Britton less his commission of 50 cents per share. Keleher did not inform Laflin to whom he had sold the stock, and even declined to do so. Laflin did not actually know that it had been sold to Britton until some time afterwards. Keleher supposed Britton was making the purchase for himself or some other person, and did not know that he was buying it as "trustee for the bank." After Keleher had delivered the stock certificates for the 85 shares with the blank power to transfer indorsed thereon, and had collected the check and had left the bank, but on the same day, Britton delivered the stock certificates, assigned in blank, together with the blank powers of attorney signed by Laflin, to one E. Girault, the general book-keeper of the bank, with instructions to credit from the general funds of the bank Britton's individual account with the amount paid for the stock, viz., $5,037.50, which was done, and to charge the like amount in the books of the bank to "sundry stocks" account, and to transfer the 85 shares on the stock transfer book to "James H. Britton, trustee." Girault obeyed these directions. The transfer of the stock on the transfer book was accordingly made to "James H. Britton, trustee," not stating for whom he was trustee. But in the stock ledger the transaction was entered in an account entitled, "James H. Britton, trustee for bank," meaning Britton's own bank. Girault, in making the transfer of the shares, filled in his own name as attorney in the blank powers of attorney signed by Laflin, and signed the transfer to Britton as trustee thus, "S. H. Laflin by E. Girault, attorney." Girault had actual knowledge at the time that this stock had been paid for in the manner hereinbefore stated. No new certificates of stock for the eighty-five shares were ever issued to Britton or any one else. Neither Keleher nor Laflin knew of the foregoing direction of Britton to Girault nor what Girault did in respect thereto. Other stock to a very large amount was from time to time purchased from other persons by Britton and paid for in the same way and transferred and entered in the same manner. No formal resolution of the directors appears authorizing this to be done, but the directors knew of and assented to Britton's acts in this regard.

At the time of the suspension of the bank, June 20th, 1877, there were it seems, 4,599 shares of its own stock standing in the name of "James H. Britton, trustee," which had been purchased by him with the funds of the bank, under circumstances more or less similar to the purchase from the defendant, Laflin.

All of the stock thus standing in the name of Britton, trustee, including that purchased from Laflin, was voted by him at the election of directors held May 29, 1877. Britton had been for years the owner of a large amount of stock in the bank in his own name and right, and thus owned 1,542 shares when the bank suspended. Britton's credit was good at the time of this transaction, and there was nothing in the nature of the transaction—in the fact of the purchase, the amount or mode of payment, or the price paid—calculated to awaken suspicion on the part of Keleher that it was not a regular transaction on Britton's own account. Laflin did not receive more than the stock was then considered to be worth in the market. Laflin did not know that the bank was insolvent, and his firm continued to deposit money with it until it closed. Keleher testifies that he considered the bank "sound in all respects" when he made the sale to Britton. The bank had not at that time committed any act of insolvency.

This is a bill in equity by the receiver against Laflin and Britton to compel Laflin to pay back the $5,037 50; to set aside the transfer of the eighty-five shares of stock; to have Laflin declared to be

still a stockholder in the said bank in respect of said shares, and to have Britton ordered to retransfer the shares to Laflin on the books of the bank.

The bill as to Britton stands confessed. Laflin answered denying the material charges in the bill. Replication was filed and proofs taken. The cause is before the court on final hearing.

The following provisions of the national bank act, taken from the Revised Statutes are those which more directly relate to the questions arising in this case:

SEC. 5,139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. Every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired.

Sec. 5,151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares. * * *

SEC. 5,201. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, or in default thereof a receiver may be appointed to close up the business of the association, according to section 5,234.

SEC. 5,204. No association or member thereof, shall, during the time it shall continue its banking operations, withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. * * * But nothing in this section shall prevent the reduction of the capital stock of the association, under section 5,143.

SEC. 5,152. Persons holding stock as executors * * * or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, * * * or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

SEC. 5,210. Requires a full and correct list of all the shareholders to be kept, subject to inspection of all the shareholders and creditors, and a verified copy of such list to be sent annually to the comptroller of the currency.

Henderson & Shields, for plaintiff; *A. W. Slayback*, for defendant.

DILLON, Circuit Judge:

The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency, June 23, 1877, the bank having suspended payment three days before. Rev. Stats. Sec. 5,234. The defendant, Laflin, had for some years prior to May 16, 1877, been the holder of eighty-five full-paid shares in that bank. At the date of the suspension of the bank the defendant, James H. Britton, was its president, and had been such for years prior to that event. On the 16th day of May, 1877, Laflin sold through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon indorsed, to transfer the shares on the books of the bank. Laflin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for $5,037 50, which was immediately presented and paid. Laflin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check and the money received, but on the same day, they were transferred in pursuance of Mr. Britton's directions by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laflin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laflin's agent who negotiated the sale of the shares, nor Laflin himself, had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault, the book-keeper of the bank who made the entries, and who had inserted his name in Laflin's blank power of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff as the receiver of the bank against Laflin and Britton, to compel Laflin to repay the $5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the 85 shares on the stock transfer books of the bank.

The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats., section 5151), it is important to those shareholders who made no sale of their stock to know who are shareholders with them liable to contribute to meet "the contracts, debts and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act, to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a national bank from thus becoming a "pur-

chaser of the shares of its own capital stock," (Rev. Stats., sec. 5201), if Laffin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been extra vires and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *Re* London, etc., Exchange Bank, Law Rep. 5 Ch. App. 444, 452; Great Eastern R'y Co. v. Turner, Law Rep. 8 Ch. App. 149; Currier v. Lebanon Slate Co., 56 N. H. 262. And although Laflin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction can not stand, and the receiver may compel him to pay back the money thus received and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so. But Laflin, or his agent, Keleher, did not deal with the bank, or with the president, with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laflin was acting in good faith. Neither he nor his agent Keleher had any actual knowledge of Britton's purpose to turn these shares over to the bank and to pay for them out of the funds of the bank. If Laflin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or, second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the bookkeeper, who made the transfer of the shares on the transfer books of the bank under Laflin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is whether Mr. Laflin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferrer from liability to the bank, its stock-holders and creditors.

In considering these questions, our first proposition is that, under the national banking act, a shareholder has the unrestricted right to make an out-and-out *bona fide* and valid sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of assuming the transferrer's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly in this country shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactments or in authorized by-laws. The national banking act (Rev. Stats., sec. 5, 139), by providing that shares shall "be transferable on the books of the association, in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied, in the section just referred to (Rev. Stats., sec. 5, 139), and that right the association can not take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exist except such as is implied from the nature of the transaction or from other provisions of the act. Another section (Rev. Stats. sec. 5, 201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder from selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder can not transfer his shares colorably and thereby cease to be a shareholder as respects creditors and other shareholders who would be injured by the transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights of the transferrer of the shares in respect thereto, but we have no occasion to determine this point. Rev. Stats., sec. 5, 139: compare id, sec. 5, 152, Weston's case, Law Rep., 5 Ch. App., 614, 620. And on general principles there may also be an implied prohibition against the transfer of shares to a pauper or man of straw or insolvent person, for the fraudulent purpose of escaping liability, but this is a matter that need not be now considered.

Subject, however, to such prohibitions and limitations, the right of the shareowner of make an actual and bona fide sale and transfer of his shares to any person capable in law of taking and holding

the same and of assuming the liabilities of the transferrer in respect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions construing the provisions of the banking act in this regard and similar provisions in other legislative enactments.

In The Bank v. Lanier, 11 Wall., 369, arising under the national banking act, it was expressly held by the Supreme Court of the United States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case after speaking of the additional value given to this species of property by reason of its tranferable quality, says: "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferrer is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers,

It was urged in the argument at the bar in the present case that the provision that the shares should "be transferable on the books of the bank" gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stock-holders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the shareholders, and as such entitled to vote, receive dividends, etc., and for the protection of bona fide purchasers of the shares and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register bona fide transfers is settled beyond all question by numerous decisions in the English and the federal and state courts. Black v. Zacharie, 3 How. 483; Union Bank v. Laird, 2 Wheat. 390; Webster v. Upton, 1 Otto, 65, 71; Bank v. Lanier, 11 Wal. 369; St. Louis, etc., Ins. Co. v. Goodfellow, 9 Mo. 149; Chouteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank, 52 Mo. 377; Hill v. Pine River Bank, 45 N. H. 300; Re London, etc., Tel. Co. Law Rep. 9 Eq. 653.

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various Companies' Acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors can not refuse to register a bona fide transfer of stock unless the power to do so is expressly given in the act of parliament or the articles of association. The leading authority on this point is Weston's case, Law Rep. 4 Ch. Appeals, 20. See also Gilbert's case, Law Rep. 5 Ch. 559. In Weston's case, Law Rep. 4 Ch. 20, Lord Justice Page Wood, in considering this subject, said:

"I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibilty at any time they please by going into the market and disposing of and transferring their shares without the consent of directors or shareholders or anybody, provided only it is a *bona fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles, by which the directors have powers of rejection of members. Shortridge v. Bosanquet, 16 Beav. 84: which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the companies act, 1862, in the 22d section, gives a power of transferring shares. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. * * It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And, I may add, that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause." In Gilbert's case, Law Rep. 5 Ch. Appeals, 559, 565, Lord Justice Giffard said: "I agree that, according to Weston's case, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. *Ex-parte* Penny, Law Rep., 8 Ch, App. 446; Nation's case, Law Rep. 3 Eq. 77; Fyfe's case, Law Rep. 9 Eq. 589; Allen's case, Law Rep. 16 Eq. 449; Ib., 559; Weston's case, Law Rep. 5 Ch. 614, 620; *Ex parte* Elliott, Law Rep. 2 Ch. Div. 104. In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a share-owner to dispose of his shares, said: "One of the incidents (of this class of property) is the right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer, or to

furnish some (valid and sufficient) reason for refusing to transfer." *In re* Stranton, etc., Co., Law Rep. 16 Eq. 559, per Bacon, vice-chancellor. Similar observations are made by the Supreme Court of the United States, in The Bank v. Lanier, *supra*. Mr. Justice Davis then said: "The power to transfer their stock is one of the most valuable franchises conferred by Congress. * * * It enhances the value of the stock. Although neither in form nor character negotiable paper, they (the share certificates) approximate to it as nearly as possible."

It would be a new, and, I apprehend, a startling doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse and so foreign to all received notions, and the universal practice and mode of dealing in these stocks, that it can not, in the absence of legislative expression, be held to exist.

For these reasons and upon these authorities the proposition must be considered as established that a shareowner in a national bank, while it is a going concern, has the absolute right, in the absence of frand, to make a *bona fide* and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same, and of assuming the transferrer's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laflin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that as to Laflin it was not a sale and transfer of the stock to the bank. Laflin sold through the broker or agent, Keleher; and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned in blank, with powers of attorney in blank thereon indorsed, authorizing the transfer of the shares on the books of the bank.

As between Laflin and Britton, the transfer was complete by the sale, assignment, delivery and payment, without registration, and this whether it gave Britton before the registration the legal title to the shares as against Laflin or only a complete equitable title. Union Bank v. Laird, 2 Wheat. 390; Webster v. Upton, 1 Otto, 65, 71; Black v. Zacharie, 3 How. 483; Bank v. Lanier, 11 Wall. 369, 377; Choteau Spring Co. v. Harris, 20 Mo. 382; Moore v. Bank, 52 Mo. 377; N. Y., etc., R. R. Co. v. Schuyler, 34 N. Y. 80; McNeill v Bank, 46 N. Y. 325; Grimes v. Howe, 49 N. Y. 17, 22; Bank of Utica v. Smalley, 2 Cowen, 778; Bank of Commerce's Appeal, 73 Pa. St. 59; Ross v. S. W. R. R. Co., 53 Ga. 514; Hoppin v. Buffum, 9 Rhode Island, 513; Bank of America v. McNeil, 10 Bush (Ky.), 54; Davis v. Lee, 26 Miss. 505; German, etc., Ass. v. Sendemeyer, 50 Pa. St. 67; Leavett v. Fisher, 4 Duer, 1.

That the transaction is complete as between seller and purchaser of stock by the assignment and delivery of the certificate assigned with power to transfer and the receipt of payment is fully shown by these cases, and is also evident from the fact that thereupon the each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. Webster v. Upton, 1 Otto, 65, 71.

And for the like reason the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books may file a bill to compel the vendee to record the transfer. Shaw v. Fisher, 2 DeGex and S. 11; Cheale v. Kenward, 3 DeGex and J. 27; Wynne v. Price, 3 DeGex and S. 310; Webster v. Upton, 1 Otto, 65, 71.

So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. Bank v. Lanier, 11 Wall, 369; Hill v. Pine River Bank, 45 N. H. 300; Bank of Utica v. Smalley, 2 Cowen, 778; Commercial Bank v. Kortright, 22 Wend. 348.

The delivery of the share certificates assigned in blank and blank transfers will entitle the bona fide vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned with power to transfer, is entitled to have the stock transferred" per Davis, J., Bank v. Lanier, 11 Wall, 369, unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer, as in the case of the Union Bank v. Laird, 2 Wheat. 390. In that case the charter gave the bank a lien for the shareholders' debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances the bank was held to have a lien on the shares to secure the shareowner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. Black v. Zacharie, 3 How. 483.

If the foregoing propositions are sound, Britton against Laflin had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers and have the transfer registered. *Re* Tahite Cotton Co., Law Rep. 17 Eq. 273; German Union Ass. v. Sendmeyer, 50 Pa. St. 67; Leavitt v. Fisher, 4 Duer, 1; Commercial Bank v. Kortright, 22 Wend. 348. Nothing more was required to be done by Laflin or needed to enable Britton to make his title complete. And Laflin could have compelled Britton to register the transfer. If Laflin had proceeded against Britton he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. Maxied v. Payne, Law Rep. 6 Exch. 132. It would have been no answer to Laflin for Britton

to have said "I bought this stock, not for myself, but for the bank." Laflin could have rejoined, "You purported to act for yourself. I supposed you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England under the companies acts that the transferrer of shares is liable to be treated as a stockholder until he transfers to one who is in law capable of holding and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. Fyfe's case, Law Rep. 4 Ch. Appeals, 768; Lowe's case, Law Rep. 9 Eq. 589; Shropshire, etc., R'y and Canal Co. v. The Queen, Law Rep. 7 House of Lords cases, 496, 513; McEwen v. West London Wharves, etc., Co., Law Rep. 6 Ch. Appeals, 655; Weston's case, Law Rep. 5 Ch. Appeals, 614, 620; Gooch's case, Law Rep. 8 Ch. Appeals, 266; Gilbert's case, Law Rep., 5 Ch. Appeals, 559; Master's case, Law Rep. 7 Ch. Appeals, 292; Nickalls v. Merry, Law Rep. 7 House of Lords cases, 530; Symonds' case, Law Rep. 5 Ch. Appeals, 298; Heritage's case, Law Rep. 9 Eq. 5.

Assuming, without deciding, that this principle applies in all its force under the national banking act, if Laflin had sold to an infant, his liability would remain, notwithstanding the transfer was registered. Nickalls v. Merry, Law Rep. 7 House of Lords cases, 530; Symonds' case, Law Rep. 5 Ch. Appeals, 298. If he had sold to the bank, he would remain *prima facie*, if not actually, liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer—that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as "trustee," without Laflin's knowledge. But the act Rev. Stat., (sec. 5 152), authorizes the holding of stock by a trustee. If Laflin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que trust*.

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que trust* who is liable. He is liable for the unauthorized investment and use of the trust moneys of the bank, and can be compelled to refund it. Great Eastern Ry. Co. v. Turner, Law Rep. 8 Ch. Appeals 149. If it becomes necessary to assess the stockholders he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que trust* capable of taking and holding the shares. If the sale of this stock had been registered to Britton individually it is clear that Laflin would not have been liable to the bank or its creditors; and as the matter now stands, the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of to him as "trustee."

Our third proposition is, that Laflin is not liable, because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laflin parted with value—with his shares, with his power of control over them, and the right to sell them to others, and had no notice at or prior to the consummation of the transaction that Britton was acting *ultra vires*, and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agents had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laflin had constructive notice. Mr. Shields, in his argument, bases Laflin's liability on the proposition that being a shareholder in the bank he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if in a transaction directly with the bank he had received moneys to which he was not entitled, he could be made to pay back the same irrespective of the question of knowledge on his part. Curran v. Arkansas, 15 How. 304; Railroad Co. v. Howard, 7 Wall. 392.

But it is to be remembered in this case that Laflin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide;* and he has the same right to sell his shares to another shareholder that he would have to sell them to a person not a shareholder.

Even directors have the right to make a *bona fide* sale of their shares, and thus get rid of liability, if they pursue the articles or charter and take no advantage of their position and commit no fraud. Gilbert's case, Law Rep. 5 Ch. App. 559; *ex parte* Littledale, Law Rep. 9 Ch. Appeals, 257.

And share-holders in the exercise of their right to transfer shares are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. Bargate v. Shortridge, 5 House of Lords cases, 297, 323; Taylor v. Hughes, 2 Jones and Lat. 24; *ex parte* Bagge v North Coal Co., 13 Beav. 162.

Nor are directors, it seems, much less shareholders in the transfer of their stock bound to take notice of the books of account of the company. Cartmell's case, Law Rep., 9 Ch. App. 691; Hill v. Manchester, etc., Co., 2 Nev. and M., 573; 5 Barn. and Adol. 874; Haynes v. Brown, 36 N. H. 568.

We are of opinion, therefore, that the sale and transfer of the stock, as between Laflin and Britton, was complete as soon as the stock was delivered assigned in blank, with the power to transfer, and payment received; and that what Britton, without Laflin's knowledge, afterwards did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laflin, whose status had already been fixed, and whose rights had already been acquired. Bank of America v. McNeill, 10 Bush. (Ky.) 54,58.

Mr. Henderson's argument for the receiver went mainly upon the ground that Laflin was chargeable through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares, and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: First, that the sale was not complete until the transfer was registered; that, in making the transfer, Girault, although acting under Britton's directions, was solely Laflin's agent, (by virtue of his inserting his name in the blank power of attorney), and that, inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase-money out of the general means of the bank, the law imputes this knowledge to Mr. Laflin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz: that the transaction between Laflin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank and in the community. He was not then known to be insolvent. Indeed, it is not shown by the proofs that he is now insolvent. Laflin could have compelled him to register the transfer in his own name In the eye of the law the transfer to Britton, as "trustee," is a transfer to Britton individually, for, as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. Ashurst v. Mason, Law Rep., 20 Eq., 225; *ex parte* Littledale, Law Rep., 9 Ch. Ap., 257. If Laflin had a completed right, immediately on receiving payment for the shares, to have Britton register the transfer of the shares; and if, immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laflin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laflin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question whether Girault in consequence of his relations to Britton and the fact that he acted as his servant and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laflin, in such sense that knowledge acquired by him from Britton is to be imputed to Laflin. It deserves consideration whether under the circumstances Girault was Laflin's agent so as constructively to affect Laflin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority and in hostility to his rights as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laflin's behalf and they certainly have great force. For in this view, if the name of some one outside the bank, having no knowledge of what was going on inside the bank had been filled in by Britton as the attorney to make the transfer, or if Britton had it filled in his own name, Laflin would not be liable. It is certainly extremely narrow ground to make Laflin's liability depend upon the accident whose name shall be used to make the formal transfer and upon what knowledge of the interior working of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It was strongly urged at the bar by Mr, Henderson for the receiver that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on share-holders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the shareowner to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while on the other hand the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should, through the directors, have a veto on the right of a shareholder to transfer his shares such a power must be plainly conferred. It has not been given and cannot therefore be held to exist.

It is proper to remark in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right of transfer has reference to transfers in solvent and going concerns and are not intended to enable share-holders to escape from liability where the association has committed an act of insolvency or has ceased to be a going concern. Allen's case, Law Rep., 16 Eq., 449, per Lord Chancellor Selbourne; Chappell's case, Law Rep., 6 Ch. App. 902. While we maintain the right of a shareholder to dispose of his shares absolutely, by an out and out sale and registered transfer and thus escape liability, provided the sale is made bona fide, and the purchaser is in law capable of assuming the liabilities of the transferrer, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders or upon the creditors of the bank.

The result is that there must be a decree dismissing the bill as to Laflin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

Bill dismissed.

FOR sharp practice the following, which a prominent lawyer of Ohio vouches for, is certainly unique: "Suit is brought by A v. B, and B's wages garnished; on return day of process, A's attorney discovers B is a minor, and he can not recover of him on his cause of action. So he has the case continued, and then goes to the justice and has himself appointed guardian *ad litem* for B, and then at once confesses judgment in favor of A; and then as A's attorney has an order made on the garnishee to pay the money, and as attorney gobbles it."

CONTRIBUTORY NEGLIGENCE.

CHICAGO, ROCK ISLAND & PACIFIC R. R. v. HOUSTON.

Supreme Court of the United States—October Term, 1877.

1. CONTRIBUTORY NEGLIGENCE — NEGLECT TO SOUND WHISTLE DOES NOT EXCUSE NEGLECT OF PARTY TO TAKE PRECAUTIONS.—The neglect of an engineer of a locomotive of a railroad train to sound its whistle or ring its bell on approaching a street-crossing, does not relieve a party from the necessity of taking ordinary precautions for his safety. He is bound to use his senses—to listen and look—before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. If he omit to use them, and walk thoughtlessly upon the track, he is guilty of culpable negligence; and if he receive any injury, he so far contributes to it as to deprive him of any right to complain. If, using them, he sees the train coming, and undertakes to cross the track instead of waiting for the train to pass, and is injured, the consequences of his mistake and temerity can not be cast upon the railroad company. If one chooses in such a position to take risks, he must bear the possible consequences of failure.

2. TO INSTRUCT UPON ASSUMED FACTS to which no evidence applies is error. Such instructions tend to mislead the jury, by withdrawing their attention from the proper points involved in the issue.

In error to the Circuit Court of the United States for the Western District of Missouri.

Mr. Justice FIELD delivered the opinion of the court:

This was an action against the defendant, the railroad company, brought under a statute of Missouri, which subjects a corporation to a fine of $5,000 where death is caused by an injury resulting from "the negligence, unskillfulness or criminal intent" of any of its officers, agents, servants or employees, while running, conducting or managing a locomotive, car or train of cars. In this case the deceased was the wife of the plaintiff; her death was caused by injuries inflicted by a locomotive of a railway train belonging to the defendant, whilst the train was passing through the village of Cameron, in that state. The company had two tracks, one main and the other a side track, which extended through a considerable portion of the village, and passed south of Second street.

The tracks were separated from each other by only a few feet. The house at which the deceased resided was north of Second street and east of Harris street, which the tracks crossed. South of the two tracks and about ninety feet east from Harris street was situated a building belonging to the company, called the section-house, near which was a well of water. Both building and well on the company's right of way. The train was due, on the evening when the accident occurred, at half-past six, and it entered the village from the west. At that time a gravel train had been switched on the side track east of Harris street, between the section-house and the depot. Freight cars were also standing on the side track west of but near Harris street. There was a plank crossing over the railway at Harris street. When cars were not standing on the track there was nothing to prevent one passing in a direct or nearly direct line from the house of the deceased to the section-house. Persons, in going to the well from the Houston house, sometimes pass the road at the public crossing and sometimes on the right of way of the company east of Harris street. The evidence disclosed by the record relating to the accident, only shows that at about half-past six, in the evening of the 13th of March, 1872, the deceased took a pail upon her arm and left her house, and, it is supposed, started for the well near the section-house. She was seen by her daughter, as she left the house, and by the engineer, a few seconds before she was struck by the locomotive. It does not appear that she was seen by any other person after leaving the house before she was injured. When discovered by the engineer the locomotive was within four feet of her. She was then on the main track of the railway, about ninety feet east of Harris street, and was apparently passing from the track south. She was struck by the extreme end of the beam of timber running across the engine, known as the bumper, and was thrown into a ditch about ten feet from the section-house. The engineer testified that when he discovered her it was impossible to stop the train so as to avoid striking her. She died within an hour after receiving the injury.

It appears from the evidence also that the railway was in plain view from the house of the deceased, and that a train approaching from the west could be seen from it, and from any point between the Harris street crossing and the section house, for a distance of three-quarters of a mile. At the time of the accident there was a bright moonlight, and the headlight of the engine was burning, and the movement of the train created a loud noise. There was some conflict of evidence as to the rate of speed at which the train was running at the time and whether its bell was rung and its whistle sounded. As to the other facts stated the evidence was all one way. If then, the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the "negligence, unskillfulness, or criminal intent" of the defendant's engineer. Had the train been moving at an ordinary rate of speed it would have been imposible for him to stop the engine within four feet of the deceased. And she was at the time on the private right of way of the company, where she had no right to be. But aside from this fact, the failure of the engineer to sound the whistle, or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to see and hear the train

which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity can not be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses in such a position to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we can not see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be presented, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances the Court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant.

But the plaintiff in error specially complains that the court below gave instructions which assumed as established matters not in proof, and thus directed the attention of the jury to subjects which might mislead their judgment. Thus, while a train coming from the west could be seen, as already stated, from any point between Harris street crossing and the section-house, for a distance of three-quarters of a mile, the court, in its charge, assumed that the light from the train might have been obstructed by cars on the side track, in the vicinity of the place where the injury was inflicted, and told them that whether the view was thus obstructed was for them to determine. Again, there was no evidence of any attempt on the part of the deceased to cross the railway at Harris street crossing. She was not seen, as already stated, except when leaving her house, until immediately previous to her injury, and then she was ninety feet east of the crossing. Yet the court, at the request of the plaintiff, instructed the jury as to the right of the deceased in passing the railway upon a public crossing, to rely upon a substantial compliance by the servants of the company with the duties required by law in giving signals and warning of approach, and as to its liability if deceased was killed by the cars while they were running to and over a public street crossing without giving the required and usual signals of approach; and further instructed them. upon its own motion, that there was a controversy upon the evidence whether she crossed or attempted to cross the railway at the Harris street crossing, or at a place not a crossing, and that this was a fact for their determination.

To instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tend to mislead them by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration. In no respect could the instructions mentioned have aided them in reaching a just conclusion.

The judgment must be reversed and the cause remanded for a new trial; and it is so ordered.

DIGEST OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

October Term, 1877.

PRACTICE—REVIEW BY SUPREME COURT—BILL OF PARTICULARS.—1. The Supreme Court has no jurisdiction to revise the action of an inferior court upon the question of granting or refusing a new trial, and the final judgment of such court can not be examined through its rulings upon that question. If, when the final judgment is brought here for review by writ of error, no other documents are presented for consideration than such as were before the inferior court upon the application for a new trial, this court can not look into them, and if error is not otherwise disclosed by the record, the judgment will be affirmed. 2. This court must have before it a bill of exceptions, or what is equivalent to such bill, upon which the final judgment of the court below was reviewed, or it will not examine into any alleged errors, except such as are otherwise apparent on the face of the record. *Kerr v. Clampitt.* In error to the Supreme Court of the Territory of Utah. Opinion by Mr. Justice FIELD. Judgment affirmed.

MUNICIPAL BONDS—GUARANTY — LEGISLATIVE POWER.—1. Where an ordinance of a city authorizing a contract with a gas company, and the issue to it of bonds of the city provided that the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity;" *Held*, 1, that the guaranty embraced both the principal and interest of the bonds; and, 2, that the ordinance contemplated two undertakings by the company—one to the bondholder and one to the city. The guaranty was to be for the security of the bondholder; it was to be an undertaking to answer for the city's liability. The other undertaking was to be for the security of the city by placing the company under obligation to provide for the payment of the principal of the bonds on their maturity, an obligation which otherwise would not have existed. 2. The indorsement by the president of the company on the bonds guaranteeing "the payment of the principal and interest thereof" was a substantial compliance with the provision of the ordinance and contract as to the guaranty. 3. It is competent for the legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which from some irregularity or omission in the proceedings by which they were created, can not be enforced at law. 4. A law requiring a municipal corporation to pay such a claim is not, within the constitutional provision, inhibiting the passage of a retroactive law. *Jefferson City Gas Light Co. v. Clark.* In error to the Circuit Court of the United States for the District of Louisiana. Opinion by Mr. Justice FIELD. Judgment affirmed.

LIFE INSURANCE—VALID PAYMENT OF PREMIUM LIEN ON POLICY.—The policy was upon the ten-payment life plan, in consideration of the annual premium of $615.40. All indebtedness to the company was to be deducted from the amount of insurance when due. In case of non-payment of premium, or of any note given in part payment of premium when due, the policy was to become void. Dividends were to be applied toward the payment of the note. If the policy should become void, the insured was to be liable to pay all notes taken for premiums remaining unpaid, except the balance unpaid on the note taken for part premium and made payable twelve months after date, which was to be cancelled upon the surrender of the policy. After two annual payments, if desired, a paid-up policy would be issued for as many tenths of the original amount as there had been "annual premiums paid in cash." It was agreed at the time of executing the policy, that the annual premium should be paid part in

money and part in a promissory note at twelve months, with interest at seven per cent, the amount of the note to be a permanent loan, until cancelled by dividends, and that a new note was to be executed each year at the maturity of the old, and including the amount of the prior note. The premium note was described in the receipt as the "amount of premium loaned this year." Four annual payments had been made. *Held*, 1, that the execution of the note was, in effect, a payment in cash, which was loaned back by the company; 2, that the plaintiffs were entitled to a paid-up policy for four-tenths of the original sum, without previous payment of the note; 3, that the amount of the note with accrued interest, less dividends, was a lien upon the policy, to be deducted when it became a claim; 4, that the case was not affected by a change in the company's practice subsequent to the issue of the policy, insisting upon the payments of the note as a condition to the issue of a paid-up policy. *Brooklyn Life Ins. Co. v. Dutcher.* Appeal from the Circuit Court of the United States for the Eastern District of Missouri. Opinion by Mr. Justice SWAYNE. Decree affirmed. Reported in full, 7 Ins. L. J. 18. For opinion of court below see, 2 Cent. L. J. 153.

FIRE INSURANCE — DISTILLER'S BOND FOR TAX —TRANSFER OF PARTNERSHIP INTEREST—REPLEVIN BOND.—The policies agreed to "insure Messrs. Thomp- & Co. against loss or damage by fire—upon whisky, their own, or held by them on a commission, including government tax thereon, for which they may be liable, contained in the log bonded warehouse of G. H. Deaven." The whisky was owned by Thompson & Co., Walston being the Co., who were also sureties on Deaven's distillery bond, and as such liable for the government tax if not paid by D., or made out of the whisky. The policy provided that it should be void, "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." The loss was settled, except as to the tax, where the liability was undecided. Judgment was subsequently obtained by the government, in Kentucky, on the bond, for the tax, the companies declining to defend as parties. Thompson & Co. replevied the judgment and brought suit against the companies for the amount. There was evidence tending to show that. previous to the fire, Walston had sold all his interest to Thompson, and that another brother of T. had become interested in the firm. *Held*, that it was the intention of the insurers to insure another than the proprietary interest of T, & Co.in the whisky, viz., their liability for any loss on the bond. *Held*, that this was as much an insurable interest as freights at sea, or profits in an adventure. Firemen's Ins. Co. v. Powell, 13 B. Mon. 321; Gordon v. Mass. Ins. Co., 2. Pick. 249; Rohrback v. Germania Ins. Co., 62 N. Y. 53. *Held*, that Walston was not relieved from this liability by any sale of his interest, and the liability of the company was not affected by the policy clause, prohibiting a transfer of interest. *Held*, that the replevin bond was a satisfaction of the judgment in Kentucky, which answered the objection that the tax had not been paid, and the judgment itself, together with the refusal of the company to defend, answered the objection that the government could not collect the tax. *Germania Fire Ins. Co.et al. v. Thompson.* Error to the Circuit Court of the United States for the District of Kentucky. Opinion by Mr. Justice MILLER. Judgment affirmed. Reported in full, 7 Ins. L. J. 13.

HON. W. N. H. Smith has been appointed Chief Justice of the Supreme Court of North Carolina, *vice* Pearson deceased. The election for judges of the Supreme Court of that state takes place in August next. By a late constitutional amendment, the number of judges is injudiciously reduced from five to three.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Associate Justices.

COMMERCIAL LAW—BILLS AND NOTES.—This court has repeatedly held, and now holds again, that a party who writes his name on the back of a note of which he is neither payee nor indorser, in the absence of extrinsic evidence, is to be treated as a maker of the note. 18 Mo. 24; 30 Mo. 225; 60 Mo. 297; 48 Mo. 23; 58 Mo. 75. Opinion by NORTON, J.—*Semple et al. v. Turner.*

INDICTMENT— MURDER— INSTRUCTIONS.—Where, on an indictment for murder in the first degree, the defendant has been convicted of murder in the second degree, and the instructions given in regard to murder in the second degree were properly given, this court will not reverse the judgment, even although improper instructions on the subject of murder in the first degree may have been given by the court. State v. Underwood, 57 Mo. 40. Opinion by NORTON, J.—*State v. Fritteres.*

PRACTICE—VOID JUDGMENT. — In a suit against three defendants, the plaintiff dismissed as to one and took judgment as to the other two. Afterwards one of these two came with his motion to vacate, and set aside the judgment, because the court never had jurisdiction over him. The return was *non est* as to this defendant, and the answer was, in fact, filed for the two other defendants. No conflicting evidence on motion, which the circuit court overruled. The judgment is reversed. Opinion by NORTON, J.—*Craig & Motter v. Smith et al.*

VENDOR'S LIEN—WAIVER—PAYMENT.—Where one takes the notes of a third person as payment of the purchase-money for land sold to another, no lien exists as to the amount represented by the notes so taken as payment. Where, in such a case, the vendor advised the purchaser to take a mortgage from a third person to secure such notes, and that he would hold him liable on such notes if he failed to do so, and the purchaser procured the mortgage and transferred it to the vendor, the lien as to such notes was waived even if they had not been taken as an absolute payment in the first place. 55 Mo. 254—Opinion by NORTON, J. *Anderson v. Griffith.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, January 21, 1878.]

HON. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

PARTNERSHIP PROPERTY—DOWER.—Two pieces of real estate, owned by a firm, of which the petitioner's husband was a member, were appropriated to pay the partnership indebtedness; one by foreclosure of a mortgage, which petitioner did not sign, and to which suit she was not made a party. The other by sale under execution. Plaintiff in error claims dower in this property. Scott, J. (abstract of opinion): It makes no difference how the property is appropriated to pay the debts of the firm, whether by mortgage, execution or decree of court. The principle is, that a widow has no dower in partnership real estate till all the partnership debts have been paid, and all accounts

between co-partners adjusted, and any mode of sale which passes the title for that purpose, will, it is apprehended, bar the widow's claim to dower. Whether the petitioner has a technical claim for dower, under the circumstances in this case, it is not necessary to consider. The question above considered is most elaborately discussed in Dyer v. Clark, 5 Metcalf, 562, and Howard v. Priest, id. 582. Decree affirmed.—*Simpson v. Leech.*

MECHANIC'S LIEN—AGENCY.—Prout, one of the defendants below, gave to her daughter, Mrs. Strawn, lot 17, block 3, University Subdivision, of Section 34, in the city of Chicago, and, while erecting a building upon it, which was to be used by her as a residence, made a written contract with the complainant, O'Hara, in pursuance of which he did the plumbing and gas fitting. O'Hara filed a bill in the court below, claiming that Prout acted as the agent of Mrs. Strawn, and sought to have a lien declared on the premises. Prout appeared in the contract with O'Hara, as the only party in interest, there being in it nothing to indicate that he was acting other than in his own behalf. Mrs. Strawn had, during the progress of the work, visited the house and given the complainant certain directions as to the placing of fixtures. This was the only evidence of agency. The court below decreed in favor of complainant. Breese, J. (abstract of opinion): In his circumstances, Prout had an undoubted right to deed this property to his daughter, and there is nothing in the contract with O'Hara to indicate that he intended to make Mrs. Strawn or the property liable. The main question is one of agency, and the only circumstance which tends to connect Mrs. Strawn with the case, is her making occasional suggestions as the work went on. The house was being built for her benefit, by her father for her to live in, and it was but natural she should display an interest in it. The proofs wholly fail to connect the contract for the work with Mrs. Strawn or the property. Reversed and remanded.—*Strawn v. O'Hara.*

JURISDICTION—ATTACHMENT—JUDGMENT AGAINST PERSON AND AGAINST PROPERTY.—In an attachment proceeding defendants below appeared by attorney before the justice of the peace and had a personal judgment rendered against him, but none against the property which had been levied upon. He appealed to the circuit court, and judgment was rendered against him, but no order made for the sale of the property. He appealed to this court. Walker, J. (abstract of opinion): However defective the service, this was cured by appearing before the justice of the peace who then had jurisdiction. Perfecting his appeal to the circuit court gave that court jurisdiction over the defendant's person, whether the justice had it or not. It matters not whether the affidavit for the attachment, the levy, or the return, were or were not sufficient, as neither the justice of the peace nor the circuit court rendered any judgment for the sale of the attached property. The failure of the court to order a sale of the property seized, operates as a dismissal of the attachment, and releases the property from the levy; and the judgment was only personal against the defendant, to be enforced precisely as if no attachment had been sued out and levied. Though the writ is quashed if there have been personal service, there is no reason why it may not stand as a summons, good to bind the defendant on a personal judgment. When the circuit court rendered a personal judgment, it operated as fully to quash the writ as if defendant's motion to quash had been sustained and a formal order entered, and the property could not have been sold, except under the statute for the sale of perishable property. Judgment affirmed.—*Wasson v. Cone.*

CERTIFICATE OF DEPOSIT—GUARANTY.—November 14, 1871, James H. Hooker deposited $2,200 with John H. Daniels & Son, bankers at Wilmington, and took a certificate of deposit for that amount, payable at ten days' notice, on the back of which was written the name of Alanson Gooding, and no other writing. In October, 1873, Hooker sued Gooding and others in assumpsit, and Gooding insisted that, by operation of law, he was, being only a security, released by Hooker's delay and neglect to make more prompt demand of payment. On the trial it was admitted that Hooker made no demand of payment until July 4, 1873, and that, at that time, J. H. Daniels, the principal, was utterly insolvent. Before Daniels' failure, Hooker had applied to him for payment, but, in consideration of the promised payment of a higher rate of interest, had been induced to forbear. But none was actually paid. Up to the time of his bankruptcy Daniels was solvent and able to pay. Judgment for defendant. Dickey, J. (abstract of opinion): The guaranty of Gooding was absolute, and it was error to hold that he was discharged. The credit was indefinite by the terms of the paper, and at the option of the holder. It may be that the security on such paper may have the right to bring the credit to an end by offering to pay, himself, after a reasonable time, or, perhaps, by a written demand upon the creditor to collect. The creditor upon this paper was not the curator of the interests of the security, and owed him no affirmative duty; nor did he make any contract, express or implied, to assume any such duty. He was under no obligation to make prompt demand of payment or give notice of non-payment. Reversed and remanded. —*Hooker v. Gooding.*

MORTGAGE — RECISSION — VENDOR'S LIEN.—Sheen filed a bill to foreclose a mortgage made by Jeremiah Hogan and wife, Bridget Hogan, alleging that the husband of Bridget Hogan was in his lifetime possessed in fee simple of the property. James H. Walthern, one the defendants, in his answer alleges that by articles of agreement of Nov. 5, 1869, he sold the property to Hogan, payment to be made in 1871. There was also a covenant of forfeiture at the option of the vendor, if principal and interest should remain unpaid for 30 days after the same became due. Hogan died, the principal and interest having been long due, and on Feb. 17, 1877, Walthern declared the agreement forfeited, and the same day conveyed the premises to Bridget Hogan for the exact sum due for the purchase-money, and took back a mortgage with note and also *personal security*. Sheen charges that the money secured by his mortgage was used in the improvement of the premises, and that the conveyance to Bridget Hogan was made without his knowledge or consent, and asks that his lien be declared a prior lien, and Walthern be compelled to look to his note and personal security. The court below decreed a foreclosure of complainants' mortgage subject to the prior lien of Walthern for the purchase-money secured by his mortgage. Scott, J., (abstract of opinion): The court below found the bond not forfeited but still in force. No evidence is preserved in the record, and as there is nothing to show that the court found incorrectly as to that fact, it must be held to be conclusive upon complainant. Not having asked in his bill that the court should annul the conveyance to Bridget Hogan previously made, which, if valid, would effectually cut off all interests he may have had by virtue of his mortgage, he could expect or claim only what the decree gave him. It leaves the parties in their original position which is all complainant could demand under his bill. No relief was decreed to Walthern on his answer. Rightfully considered, the decree simply directs the sale of the mortgaged property, subject to his prior lien in favor of Walthern for the purchase-money, giving complainant the privilege of paying Walthern's claim and bring subrogated to

his rights, and it was not error to decree that if he paid the vendor's claim, he should also pay the same rate of interest which the vendee was obligated to pay. Decree affirmed.—*Sheen v. Hogan.*

JOINT DEFENDANTS—JUDGMENT AGAINST PART—DEFAULT—PLEAS. — Action upon a promissory note executed by Albert, Benjamin, Isaac and Jacob Felsenthal as J. Felsenthal & Sons. Summons served on all but Jacob, who was not found. February 3d, 1875, default and judgment were entered for the amount of the note against the three defendants served with process and no action against Jacob Felsenthal. The same day the four defendants came into court by attorney and filed their plea, verified by affidavit, denying the joint liabilities of defendants. Jacob filed his further affidavit, with the plea that he had a good defence upon the merits of the whole of plaintiff's demand. The same day, Albert, Benjamin and Isaac moved the court to vacate the default and judgment as erroneously entered, a plea and affidavit of merits being on file at the time. Motion denied and exception taken. In the bill of exceptions it appears that it was admitted by all the parties in open court, that the plea and affidavits were marked filed from three to five minutes before 10 o'clock a. m., the opening hour of the court, on February 3d, 1875, but were not placed with the other papers on the file. Also that the court refused to set aside the default and judgment, because the affidavit of merits was not a sufficient affidavit in that no venue was laid, and the plea not a sufficient or proper plea for a defense. Defendants asked leave to file a proper plea, which was refused. Sheldon, J. (abstract of opinion): Admitting the insufficiency of both plea and affidavit, which the record shows were on file at the time judgment was rendered, this was no justification for rendering a judgment against three defendants alone. When all are served with process, judgment must be against all or none, unless some of the defendants interpose a personal defense, such as infancy, &c. By statute, judgment may be taken against a part of the defendants, who alone have been served with process. Although Jacob was not served, he filed a plea and thereby entered his appearance, brought himself into court and stood in in the same attitude as if he had been served with process. When a plea, regularly filed, is defective, the proper mode to meet and dispose of it is by demurrer, not to utterly disregard it as no plea. When a party defendant appears and pleads by attorney without service of process, it is error to proceed to judgment against those who have been served, without also taking judgment against him who thus appears by attorney. Judgment reversed, with leave to file an amended plea and affidavit of merits.—*Felsenthal v. Durand.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1877.

HON. HORACE P. BIDDLE, Chief Justice.
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

REPLEVIN AGAINST ADMINISTRATOR—Replevin is an action of tort. An administrator, as such, can not commit a tort. If he commits a tort, he commits it in his individual capacity, and is liable only in that capacity.—*Rose v. Cash.*

STATUTE OF FRAUDS.—Where A promises B to pay C a debt which B owes to C, such a promise is not within the statute of frauds, which requires every agreement by one person to answer for the debt of another to be in writing. In such a case, A does not promise to pay B the debt of another, but merely to pay B's debt to another. 45 Ind. 96; 11 A. & E. 438. Opinion by NIBLACK, J.—*Whitesell v. Heiney.*

ARBITRATION—INFANTS.—A mutual submission of demands and claims to arbitration is binding, so far, that the mutual promises are a consideration each for the other. A man may submit to a reference for another, and will, in most cases, be answerable for the obedience of that other to the award. A parent or guardian may submit to arbitration for an infant. A guardian or parent may enter into a submission that will bind him personally, that his ward or infant child shall perform the award. Opinion by HOWK, J.—*Smith v. Kirkpatrick.*

REASONABLE DOUBT—SEPARATION OF JURY.—1. In a criminal case, to exclude reasonable doubt, the evidence must be such as to produce, in the minds of prudent men, such certainty that they would act on the conviction produced without hesitation in their own most important offices, 2. In a criminal case the court may permit the jury to separate, after they have retired to consult upon their verdict, with the consent of the defendant, and when the court gives such permission to the jury, in the hearing of the defendant and his attorney, and they make no objection, consent will be presumed. Opinion by PERKINS, J.—*Jarrett v. The State.*

COMPETENCY OF JURORS—DRUNKENNESS.—The fact that a juror is not a householder or a freeholder is waived if the question whether he was or was not such was not asked him when the jury was empaneled. The fact that a person has expressed an opinion before he is called as a juror, is no objection to his sitting as such, if the opinion expressed was not formed on the facts of the case, but from mere rumor, and would not influence his action in the case. Drunkenness is no excuse for crime, but if so long continued as to destroy mental power as to intention, it is a good ground of defense. Opinion by PERKINS, J.—*Gallooley v. The State.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE,
" WM. P. LYON,
} Associate Justices.

APPEAL—PRACTICE.—Where an appeal is taken from a judgment, the clerk must certify the record in all respects, as required by the statute; and if an appeal be taken from an order, the clerk must certify that the papers returned on the appeal *are the originals used on the hearing of the motion*, or copies thereof, if copies are ordered to be returned. This is indispensable, unless it appears from the record itself what papers were so used. Opinion by LYON, J.—*Carpenter et al. v. Shepardson.*

EVIDENCE—CONTRADICTING WITNESS.—A party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony in direct contradiction to what such witness may have testified, and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief. Opinion by LYON, J.—*Smith v. Elmert.*

TITLE BY DESCENT—TITLE TO PERSONAL PROPERTY.—1. Under our statute, the same degrees of the whole and half blood inherit equally, unless the estate came from an ancestor to the intestate, and the half-blood of the intestate is not of the blood of the ancestor, when the whole blood of the intestate who is of the blood of the ancestor shall be preferred to the half-

blood of the intestate, in the same degree, who is not. 2. Under a will, the right to a legacy comes by the bequest. Upon intestacy, the right to distribution comes by blood. In both cases the right is subject to the administration of the estate, and, therefore, defeasible; and upon default of the executor or administrator, the right becomes a mere right of personal action against him, and pending the administration of the estate the legatee, or next of kin, has no title. Opinion by RYAN, C. J.—*Cramer v. Kirkendall.*

DUTY OF TRUSTEE TO TRUST ESTATE—TAX CERTIFICATE.—1. Where one of two joint trustees suffers the other to become indebted to the trust estate, while it was becoming indebted to himself, he is not entitled to a several lien for his debt, which a faithful administration of the trust by both trustees would have prevented. 2. If one purchase certificates of a tax sale against an estate, and hold them adversely, he is entitled, as against the estate and its owner, to the rate of interest which such certificates draw by statute; but a *trustee* can neither purchase nor hold them adversely, and certificates in the hands of a trustee, with whatever purpose purchased or held, are always taken as purchased and held for the benefit of the estate; and, except in special circumstances, the purchase of certificates of a tax sale by a trustee will operate, like their purchase by the absolute owner, as a redemption of the land from the tax sale. Opinion by RYAN, C. J.—*Wilcox v. Bates.*

EVIDENCE.—A and B, the plaintiffs, as executors, leased a farm by parol either to N, the defendant, or to one Z. Z occupied the farm during the term of the lease. The plaintiff, A, was examined before the county judge at the instance of the defendant, N, pursuant to secs. 80 and 81, p. 1602, Gay. Stats., and his examination was read in evidence on the trial. He testified that there was to have been a written agreement for the leasing of the farm, and he procured one to be drawn, which was signed by himself and Z; that he presented the instrument to the defendant for his signature, but the latter did not sign it; and that he retained the instrument, but was unable to find it. Defendant offered to prove that the instrument was a lease from A to Z; that it was signed by A and Z; that there was a blank left in it for the signature of a surety for the rent; that it was presented to the defendant to sign as such surety, but he refused to sign it; and that the defendant's name did not appear in the instrument. The evidence was excluded. *Held*, error. Opinion by LYON, J.—*Torrey et al. v. Nixon.*

INSURANCE—AGENCY—WAIVER—PLEADING.—1. G. insured his house in the defendant company for one year, and within that time it was burned down. The loss exceeded the sum for which it was insured. When burned the building had been vacant nearly a month. The agents of the defendant company who wrote, countersigned and issued the policy, were informed before the fire that the building was unoccupied, and knew that it remained so until it was burned, but neglected to communicate that information to the company. Proofs of loss were made out soon after the fire, by and under the direction of such agents, and forwarded to the principal offices of the company. These not being satisfactory, the company required further proofs, and the same were made out and forwarded in due time, at an expense to the plaintiff of five dollars. The last proofs contained a statement that the building had been vacant as above stated. The policy contains the usual condition, that if the building should become unoccupied without the consent of the company endorsed on the policy, the policy should be void. *Held*, that the knowledge of the agents was the knowledge of the company, and hence that within the rule of Webster v. Ins. Co., 36 Wis. 67, and N. W. Mutual Life Ins. Co. v. Germania Ins. Co., 40 Ib. 446, the requiring of further proofs of loss after the company was chargeable with notice that a condition of the policy had been broken, (which requirement subjected the plaintiff to expense and delay), is a waiver of the breach, and estops the company to claim a forfeiture of the policy. 2. Under the code, facts constituting an estoppel must be pleaded before proof can properly be received; but this rule is not applicable where the party claiming the estoppel has had no opportunity to plead it. Opinion by LYON, J.—*Gans v. The St. Paul F. and M. Ins. Co.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

RECITAL IN OFFICER'S RETURN—ESTOPPEL.—In an action against a constable, to recover the value of a piano attached and sold by him on mesne process in a suit against the plaintiff, the constable is not estopped by his return in that suit, to prove that the former defendant and present plaintiff had no property in the piano. Denny v. Willard, 11 Pick. 519, 526; Roberts v. Wentworth, 5 Cush. 192. PER CURIAM.—*Rogers v. Cromack.*

NEGLIGENCE — VICIOUSNESS OF ANIMAL — EVIDENCE.—1. In order to establish the fact that the misbehavior of a horse contributed to an accident, it has been held to be competent to show that such misbehavior is habitual; and instances of such misbehavior, as well after the injury as before, have been held competent to prove the habit. Todd v. Rowley, 8 Allen, 51. The limit of time within which such misbehavior must be proved, must depend largely upon the discretion of the presiding judge. 2. When evidence is offered competent as tending to prove a particular fact, the court can not say that the evidence is sufficient to prove the fact, unless it is all offered and tendered for the purpose of raising, before the ultimate tribunal, the question of its sufficiency. Opinion by LORD, J. —*Maggi v. Cutts.*

GRANTS OF WHARVES—INTENTION OF PARTIES.—As a general rule, the grant of a wharf on the seashore passes the grantor's title, under the ordinance of 1647, in the flats adjacent toward low water mark, as appurtenant to, or, more directly speaking, as parcel of the granted premises. Doane v. Broad Street Assu. 6 Mass. 332; Ashley v. Eastern R. R., 5 Met. 368; Wheeler v. Stone, 1 Cush. 313, 321; Amundoun v. Granite Bank, 8 Allen, 285, 292. But, like all general rules of construction, it must yield, if a different intention is manifested by the terms of the deed or other instrument of conveyance. Stores v. Freeman, 6 Mass. 435; Chapman v. Edwards, 3 Allen, 512; Wood v. Commissioners of Bridges, 112 Mass. 394; Hathaway v. Wilson, 123 Mass. (Cent. L. J., Vol. 6, p. 59). Opinion by GRAY, C. J.—*Central Wharf Co. v. Prop. India Wharf.*

INSURANCE—SET-OFF OF PREMIUM NOTE AGAINST LOSS.—When, by the terms of a policy, it is agreed that a premium note may be deducted from the amount of loss, it is allowed to be set-off—not because it comes strictly within the statutes of set-off, but because by the contract of the parties it is clear their intention was a mutual allowance of loss and premium. Livermore v. Newburyport M. Ins. Co., 2 Mass. 232. And where the note is not due when the action is brought to recover the loss, and being payable in currency and the loss being payable in gold, the value of the note has

not been ascertained, it is allowed to be set-off on the same ground when its value is determined. Warren v. Franklin Ins. Co., 104 Mass. 518. This rule applied to a partial as well as to a total loss; and when the amount is ascertained, it may be set-off against the amount due on the note. Opinion by ENDICOTT, J.—*Un. Mut. Mar. Ins. Co. v. Howes.*

DRUNKENNESS—ARREST.—1. The "crime of drunkenness," as set forth in the Gen. St. Ch. 165, § 25, is "drunkenness by the voluntary use of intoxicating liquor." It is possible, therefore, that one may be drunk, without being guilty of the offense described. Arrested in a public place, kept in custody till sober, and then brought before a court of justice, he may be able to show that the intoxication, which he admits existed, was produced by some other cause or means than the voluntary use of intoxicating liquor. If he can do this, he is entitled to acquittal and discharge. 2. The right of an officer to arrest without a warrant, reaches by Stat. 1876, Ch. 17, the case of any person found in a public place in a state of intoxication, and does not depend on the intoxication having been produced by means which render the intoxicated person guilty of the "crime of drunkenness." The mere fact, therefore, that one arrrested by an officer, without a warrant for drunkenness, was acquitted at the trial of the complaint, is not conclusive evidence that he was not drunk when arrested, nor that the officer was not in the discharge of his duty in making the arrest and keeping him in custody afterwards as a preliminary to making complaint against him. Opinion by SOULE, J.—*Com. v. Coughlin.*

DEFECTIVE HIGHWAY—DUE CARE—CONTRIBUTORY NEGLIGENCE.—In an action of tort for injuries occasioned by an alleged defect in a highway, it appeared that the plaintiff drove his horses and loaded wagon, upon which himself and wife were riding, out of the traveled part of the highway into a ditch, two and a half feet deep, containing some six inches of mud and water. The highway upon which he was traveling was without a railing, but was constructed twenty-six or twenty-seven feet wide, for the use of carriage travel, and was, for this entire distance, even, smooth and hard. The plaintiff testified that he had the guidance and control of his horses; that he knew of the alleged defect, having just been warned by his wife, and that he drove so near the edge of the road in the daylight that, in order to prevent going over sideways, he turned his horse square off the bank, receiving the injuries. The plaintiff contended that when he found himself so near the edge of the bank, he could not stop without going off, and that he was obliged either to run into an approaching wagon, or turn off as he did. *Held*, that the plaintiff's position, so near the bank, was through his own want of due care, for which no excuse is shown. A party can not relieve himself from a dangerous position, into which his own fault has brought him, and hold the town responsible for the result. Mayo v. B. & M. R. R., 104 Mass. 137; Gaynor v. O. C. & N. R. R., 100 Mass. 208. Whether the want of a railing is a defect is not necessary to be considered. Opinion by COLT, J.—*Little v. Inhabs. of Brockton.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

INJUNCTION TO RESTRAIN ASSIGNMENT OF TAX SALE CERTIFICATES.—1. Equity will not, as a rule, interfere to restrain by injunction the assignment of tax sale certificates on real estate, where the property is subject to taxation, on the ground of irregularities in the assessment and levy of the taxes and the proceedings of the sale without the party seeking equitable relief, shall first pay or tender the taxes which are admitted to be due, or just, or which the court finds, from the evidence, ought to be paid. 2. Where the assessment roll has been properly filed with the county clerk, and no claim is made that it is lost, or that it can not be produced by the county clerk, *Held*, not erroneous for the district court to reject evidence tending to prove who made the assessment of the real estate in controversy. Opinion by HORTON, C. J. Affirmed. All the justices concurring.— *Hagaman v. Commrs. of Cloud County.*

CONSTRUCTION OF LETTER.—Where G. sent to D. a letter of which the following is a copy:

"October 1st, 1873.

"Victoria, Ellis County.

"Mr. Dabney—Dear Sir: Please let Mr. Seth and family have whatever they may want for their support and I will repay you for the same.

"George Grant."

and therefore D., at the instance of the Seth family, procured a physician to attend the family, and such physician furnished medicines and medical services to the value of $200; *Held*, in an action brought by D. against G. therefor, that D. could not recover upon the authority of the letter for the services and medicines furnished by the said physician. Opinion by HORTON, C. J. Reversed. All the justices concurring.—*Grant v. Dabney.*

ENFORCEMENT OF JUDGMENT AFTER A WRIT OF ERROR IS SUED OUT—CONSTRUCTION OF SEC. 555, CIVIL CODE OF 1868.—A contract in these words: "Mr. D., Dear Sir: please let Mr. S. and family have whatever they may want for their support, and I will repay you for the same, G." is not "a contract for the payment of money only," within the meaning of section 555 of the civil code. Gen. Stat. 739. Therefore, where a judgment was rendered in favor of D. and against G. on such a contract, and G. then took the case to the supreme court on petition in error, giving an undertaking as prescribed by section 551 and 554 of the civil code, (Gen. Stat. 737, 738) D. would have no authority to give the undertaking prescribed by said section 555, and obtain leave to enforce said judgment. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Grant v. Dabney.*

COVENANTS OF WARRANTY.—C conveys by deed with covenants two certain pieces of land to M. M conveyed one of said pieces of land to H. H was afterwards evicted. H then sued C on the covenants. The deed from C to M expressed a consideration of $575. On the trial it was shown that $375 thereof was for the piece of land conveyed to H, and $200 thereof was for the other piece of land; but C offered to prove that there was in fact no consideration for said deed, except a worthless and useless patent right, and that H knew it when he purchased his said land. But the court excluded such evidence. *Held*, that the court committed error; that if C, in fact, received no consideration from M, and if H, in fact, knew this at the time of his said purchase, he can not recover anything from C on C's covenants. Opinion by VALENTINE, J. Reversed. All the justices concurring.—*Clippenger v. Hastings.*

FORGED BONDS—IMPLIED WARRANTY—RECOVERY OF PURCHASE MONEY—1. The vendor of certain papers, purporting to be school bonds negotiable on their face by the mere act of sale, impliedly warrants the genuineness of the bonds, and is liable to the vendee, or his assignee, for what he has received from him with interest, if such pretended bonds are false and forged when delivered, and *Held*, that an action can be maintained for the money paid for such forged

bonds by the vendee against the vendor, without a return, or an offer to return to the vendor, the worthless paper; and, also, *Held*, that a resale of such forged bonds to a subvendee for a sum in excess of the price paid the vendor is no bar to the recovery of the money paid by the vendee to such vendor, although the money on the resale has not been refunded by the first vendee to the subvendee. Opinion by HORTON, C. J. Valentine, J., concurring. Affirmed. Brewer, J., not sitting.—*Smith v. McNair.*

FORECLOSURE OF MORTGAGE ON REAL ESTATE—ATTORNEY FEES ON CROSS-PETITION—1. Where it appears from a mortgage that certain pieces of real estate, with two mills and "all and singular the hereditaments and appurtenances thereunto belonging," are mortgaged; and it also appears from the pleadings and admissions of the defendants and mortgagors, that a certain mill-dam and water power are appurtenant to said mills and real estate; and it does not appear whether said dam and water power are situated on said said real estate or not; and the court below renders judgment that said mortgage is a lien upon said dam and water power, as well as upon the real estate, more particularly described in the mortgage; *Held*, not error. 2. Where M., one of several defendants in a foreclosure suit, sets forth, in his answer, a cause of action on a promissory note and mortgage against L., a co-defendant; *Held*, that such a thing is, in effect, the bringing of an action on such note and mortgage against such co-defendant; and therefore, where such co-defendant has stipulated in such mortgage to pay an attorney's fee to the holder thereof, for the prosecution of any action that might be brought to recover any amount due on said note and mortgage; *Held*, that the court, when rendering judgment on said note and mortgage, does not err in also rendering a judgment for an attorney's fee. Opinion by VALENTINE, J.—Affirmed. All the justices concurring.—*Lanone v. McKinnon.*

LIBEL — CRIMINAL AND CIVIL PROSECUTIONS — PRACTICE—ANSWER.—1. In all criminal prosecutions for libel the truth of the matter charged as libelous is not a full and complete defense, unless it appears that the matters charged were published for public benefit, or in other words, that the alleged libelous matter was published for justifiable ends, but in all such proceedings, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact. 2. In all civil actions of libel, brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to the law. 3. In a civil action prosecuted by a party to recover damages against the publisher of a newspaper for an alleged libel and a plea of justification is filed and thereon evidence of the truth of the matter published is submitted and the court instructs the jury to the effect that the fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages; that it is not a defense simply to show the truth of the matter published, but the party must go further and show that it was not only true, but that he did it with good motives and for justifiable ends, that he had some purpose in view that was justifiable; that if the defendant acted honestly for good purposes and for justifiable ends and what he said was true then he is to be excused or acquitted; and after a verdict for the plaintiff, on motion of the defendant, the court grants a new trial for misdirection of the jury, *Held*, not error, as the instructions are not applicable in a civil action. 4. Where in answer to a civil action of libel, the defendant files the defense "that the matters charged as defamatory are true," and no motion is filed to make the answer more specific, no demurrer is presented thereto; no objections are taken on the trial to the proof of the truth of the alleged libelous publication, and the court and all the parties treat the defense as one of justification on the ground of the truth of the publication: *Held*, that it is too late after the verdict to attack such answer as insufficient as a plea of justification. Affirmed. Opinion by HORTON, C. J. Valentine J., concurring. Brewer, J., not sitting in this case. *Castle v. Houston.*

BOOK NOTICES.

TENNESSEE REPORTS, Vol. 57. Reports of Cases Argued and Determined in the Supreme Court of Tennessee for the Middle Division, at the December Term, 1872. Edited by JERE BAXTER. Volume I. Nashville: James Browne. 1878.

This volume contains, so far as we can learn from the preface, the unreported decisions of the Supreme Court of Tennessee, beginning where 9th Heisk. concluded. Within its five hundred and forty pages, over one hundred cases are reported. A table of Tennessee cases cited and an excellent index are also added. The head-notes are clear and comprehensive, the type large and distinct. Without saying more, it is, perhaps, sufficient to remark, that the volume, both in its plan and execution, has been approved by Chancellor Cooper and the State Reporter.

NEW JERSEY EQUITY REPORTS, VOL. 28. Reports of Cases Decided in the Court of Chancery, the Prerogative Court, and on appeal in the Court of Errors and Appeals of the State of New Jersey. JOHN H. STEWART, Reporter. Vol. I. Trenton, N. J., 1877.

To the equity lawyer this will be a valuable book. The cases reported here are some of them decided twice—first by the chancellors at the hearing, and secondly by the court of errors and appeals. Consequently, in not a few cases, the opinions of two courts are found in one volume. Many of the cases are of great interest, particularly that of *Williamson v. The New Jersey Southern R. R.*, p. 277, which contains an elaborate and learned review of the nature of rolling-stock of a railroad. To the cases of *Thomas Iron Co. v. Allentown Mining Co.*, p. 77, upon the question of the right of the owner of the surface of land to reasonable support as against the worker of an adjoining mine, and his remedy to compel it; *Camden Horse R. R. Co. v. Citizens' Coach Co.*, p. 145 (see 4 Cent. L. J., 410), holding that the public right to use a horse railroad track in the streets of a city for vehicles, incidentally in traveling through the streets, does not authorize a transportation company to use it in competition with the railroad company; *Stoudinger v. City of Newark*, p. 187 (see 4 Cent. L. J., 410), as to the power of municipal corporations to appropriate to particular purposes land acquired by dedication; *Harris v. Betson*, p. 211, upon the degree of unsoundness of mind in a testator, which will justify a court of equity in setting aside a will made by him; *Force v. City of Elizabeth*, p. 403, as to when compound interest will and will not be allowed; *Lee v. Zabriskie*, bearing upon the construction of devises to a man and his wife without further description or condition; *Morrow v. Dows*, p. 459, as to the lien of taxes upon realty at common law, and under statute; *Midland Tunnel & Ferry Co. v. Wilson*, upon the jurisdiction of equity to protect ferries, the reporter has appended lengthy and valuable notes. In every respect, his work is worthy of his reputation. The cases reported—about 150 in all—were decided at the different terms during the year 1877.

NOTES.

THE Illinois Supreme Court, at the present term, substituted the following rule as to appeals for the one in force during the past term: In all cases removed from the Appellate Courts to this court, by appeal or writ of error, only so much of the record embracing a copy of the final judgment or decretal order of the Circuit Court, with a short statement of the facts found by the Appellate Court, and a copy of their final judgment, as shall be necessary to clearly and fully present the question upon which the decision of this court shall be sought, shall be made up, and the same shall be directed by at least two of the judges of the court from which the record is brought, and their order to that effect shall be certified as part of the record. Adopted January 18, 1878.

AT the Illinois State Bar Association dinner, Judge Gillespie, one of the few living lawyers who went on circuit with Lincoln, Douglas, and the other pioneers of the Illinois bar, gave some interesting reminiscences of those times. The people used to crowd the court-houses to watch the giants of the profession contend against each other. Fun was an element that entered largely into the composition of all forensic efforts in that day. Lincoln and Linder would keep judge, jury and audience convulsed with laughter. Indeed they could, upon all proper occasions, laugh a case out of court. The lawyers then, unquestionably, were more familiar with elementary principles than they are now. The only books to which the lawyers had access in the early days were elementary. So little was known of reports, that Adolphus Hubbard convinced a jury that Johnson, from whose reports David Baker had quoted, was a clock pedlar who had perambulated the country gathering up idle rumors, traditions and current reports, and published them in a book, which got the name of Johnson's Reports. Hubbard asked the jury how Mr. Baker dared to ask them to believe Johnson's Reports, when they would scarcely believe reports gotten up in the same neighborhood. Hubbard, of course, gained his cause before the jury.

HON. ALEXANDER S. JOHNSON, United States Circuit Judge for the Second Judicial District, comprising the states of New York, Vermont and Connecticut, died on January 26, at Nassau, Bahama Islands, of water on the chest. He was born, says the *Albany Law Journal*, in Utica, N. Y., July 30, 1817. He went through a course of study at Yale College, and was admitted to the bar when just 21 years of age. He practiced first in Utica and then in New York. He was elected Justice of the Supreme Court, at the first election under the Constitution of 1846. In 1851 he was elected to the Court of Appeals. This position he held for nine years. In 1860 he returned to his old home in Utica, and resumed there the practice of law. In January, 1873, he was appointed to the bench of the Commission of Appeals, and in December of the same year he was appointed Judge of the Court of Appeals. Subsequently, he was appointed commissioner to revise the statutes of New York, which position he resigned when he was appointed to the judicial office he held at the time of his death. He was also one of the Regents of the State University. His rank as a jurist and a man of learning was high. The opinions delivered by him are esteemed among the ablest appearing in the reports.

THE *Canada Law Journal*, in its last issue, criticises with much vigor the custom of publishing, in the official reports, the dissenting opinions of the bench. There can be no doubt at all, that a final tribunal should give forth no uncertain sound as to the law, and that the publication of conflicting judgments can only tend to weaken the authority of the rule laid down, and so to perpetuate uncertainty and to increase litigation. Another argument which it uses, comes to us with even more force, viz: that the suppression of dissenting opinions would reduce the bulk and number of reports to a material extent. "We think we speak advisedly," it says, "when we say that the little weight possessed by decisions of Lower Canada courts is partly owing to the diverse views entertained and expressed by the different judges who take part in the disposition of the case. Much better to suppress the disagreement, and not to give prominence to it by publishing *in extenso* all that can be said against the opinion of the majority. As in family matters, if there be disturbances, better not aggravate the trouble by taking the public into your confidence. When Mr. Justice Maule, according to the well-known story, gave judgment, after Judge A and Judge B had just delivered conflicting opinions, by saying that he agreed with his brother B, for the reasons given by his brother A, he never intended that the views of the court should be published for the benefit of the profession, or the confusion of suitors." While heartily concurring in the opinion of our contemporary, it is not a little surprising to find that, in the American courts, "it is not the custom to report any opinion given by the dissenting judges; the fact that such a judge dissents is mentioned, and no more." One need only go away from home in order to learn the manners of his country.

A SUBSCRIBER writes: "Allow me to propound a question in professional ethics: A is elected judge to preside over several counties. Shortly after A's election and qualification, B, A's brother, comes from another state into his brother's district and begins practice, being obliged, as the leading member of the firm, to appear often before his brother, the judge. Is there anything in professional ethics that would render such practice in bad taste? Ought an honest and upright judge, in cases of the above kind, where the opposite party or counsel object, to refuse to hear a case, and ask another judge to preside in his place?" The first part of this question which, broadly, is, should a relative of a judge be debarred from practicing in his court, is easily answered in the negative, both by common sense and by precedent. If there were any reason for such a rule, the only safe way would be to adopt a law that only one member of a family should be permitted to enter the legal profession. In England, where nearly all law is administered in one city and in one hall, such a question has never, that we are aware of, been raised. Lord Chancellors Bacon and Yorke, Erskine, Coleridge, Pollock, Denman and Thesiger, names known to almost every lawyer on this side of the Atlantic, were or are sons of judges, and practiced in the courts in which their fathers sat. To take precedents nearer home, we need only refer to Canada's first chancellor, Blake, and his son, the present vice-chancellor, Mr. Justice Field, of the Supreme Court of the United States, and his brother, David Dudley Field, the distinguished lawyer. As regards the second part of our correspondent's query, we presume that no lawyer would ask a judge to refer a case to another unless he had some reason for believing that he would be influenced by the relationship. No more injurious attack than this suggestion of possible partiality could be made upon the integrity of a judge. If he can not administer justice "without fear, favor or affection," he is no longer fit for his place, and our subscriber can readily see that he would not be unwarranted in resenting the intimation that he might possibly violate his oath.